NG LAI TIEN

v.

PEREGRINE FINANCE LIMITED

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL APPEAL NO. 12-25-1995]
10 OCTOBER 1995

CIVIL PROCEDURE: *Summary judgment - Whether any triable issues - Defence of bare denial - Whether necessary to rebut - Affidavit in reply - Non-filing - Whether non-consequential.*

COMMODITIES TRADING: *Foreign exchange - Taking foreign currency out of Malaysia - Whether required permission of Controller of Foreign Exchange - Exceptions - Leave of Court for release of money - Exchange Control Act 1953 s. 8, clause 1 to Schedule 4 - Rules of the High Court 1980 O. 22 r. 19.*

JURISDICTION: *Forum non-conveniens - Proper forum - Whether action to be filed in Hong Kong - Unconditional appearance and statement of defence - Effect - Whether tantamount to waiver.*

Pursuant to an agreement dated 14 September 1992, the appellant as a customer maintained an account to purchase commodities and all kinds of securities from the respondent, a commodities and securities brokerage firm with its registered office in Hong Kong. The appellant defaulted in injecting into his account the outstanding sum of US$18329.54 as per the contract. Consequently, the respondent filed a claim in the Sessions Court and sought for summary judgment under O. 26A of the Subordinate Courts Rules 1980. Judgment was given to the respondent and the appellant appealed. On appeal the appellant raised the issue of *forum non-conveniens* i.e. by virtue of clause 3 of the said agreement between the appellant and respondent, the matter should be filed and resolved by and in compliance with the laws of Hong Kong. The appellant also contended that there is a triable issue since the appellant was not supplied with a proper statement of account. He also pointed to the Court that since all the appellant's factual averments in the affidavit in reply was not expressly rebutted by the respondent's affidavit, they are deemed to have been admitted. The appellant also canvassed that pursuant to s. 8 of the Exchange Control Act 1953, the respondent is prohibited from taking US$18,329.54 outside Malaysia unless leave of the Controller of Foreign Exchange is obtained beforehand.

Held:

[1] By filing unconditional appearance and statement of defence, it speaks volumes that the defendant had waived any objection he might have in respect of local jurisdiction and by so doing the has obviously submitted to the present jurisdiction.

[2] The respondent's affidavit evidence had verified the cause of action and elucidated that the defendant had no defence and the sum indebted is clearly stipulated.

[3] The appellant's affidavit is a bare denial and devoid of positive averments. This being the case, there is nothing to reply to, and so, it is not incumbent on the respondent to file an affidavit in reply. As it is, only a positive assertion in an affidavit touching upon a material issue needs a reply.

[4] Even if the permission of the Controller of Foreign Exchange had not been obtained under s. 8 of the Exchange Control Act 1953, the respondent can still proceed under clause 1 of schedule 4 of the said Act by directing in the writ that the Sheriff who carries out the seizure to pay the proceeds of the execution into Court. And before the money could be released to the respondent, the requisite permission should be obtained under O. 22 r. 19 Rules of the High Court 1980.

[Appeal dismissed with costs]

Cases referred to:

ELF Petroleum SE Asia Pte. Ltd. v. Winelf Petroleum Sdn. Bhd. [1986] 1 MLJ 177 ***(foll)***

The Fehmarn [1957] 2 ALL ER 707/[1957] 1 WLR 815/ [1957] 1 Lloyd's Rep. 511 ***(foll)***

Lam Kok Trading Co. (Pte.) Ltd. & Anor. v. Yorkshire Switchgear and Engineering Co. Ltd. [1976] 1 MLJ 239 ***(foll)***

Hartley v. Hymans [1920] 3 KB 475 ***(refd)***

Charles Rickards Ltd. v. Oppenhaim [1950] 1 KB 616 ***(refd)***

Bank Bumiputra Malaysia Berhad v. Doric Development Sdn. Bhd. & 2 Ors. [1988] 1 CLJ 311 ***(foll)***

Bank of Negara Malaysia v. Mohd Ismail & Ors. [1992] 1 MLJ 400 SC ***(foll)***

Murphy v. Nolan 18 LR (Ireland) 468 ***(foll)***

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 2 AMR 1174/[1995] 2 MLJ 287 ***(refd)***

Ng Hee Thoong & Anor. v. Public Bank Bhd. [1995] 1 MLJ 281 CA ***(refd)***

Diversey (Far East) Pte. Ltd. v. Serba Pakar Kimia Sdn. Bhd. ***(foll)***

Malayan Banking Bhd. v. International Tin Council & Anor. Appeal [1989] 3 MLJ 286 ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1), paras. (a) to (d)

Exchange Control Act 1953, s. 8, Schedule 4.

Rules of the High Court 1980, O. 22 rr. 9(1), 19
Subordinate Courts Rules 1980, O. 26A

Other sources referred to:
English Supreme Court Practice 1979, Vol. 1, part 1
Mallal's Digest 1991 at p. 85, para. 281

For the appellant - Mohamed Hanipa bin Maidin.; M/s. L. Parthiban & Associates
For the respondent - Tan Jin Wah; M/s. Tan & Tan

JUDGMENT

Abdul Malik Ishak J:

The respondent is a "**commodities and securities brokerage firm**" with its registered office at number 22/F, New World Tower, 16-18 Queen's Road Central, Hong Kong. That the respondent is a company incorporated in Hong Kong is not disputed at all. The appellant as a customer of the respondent purchased commodities and securities of all kinds from the respondent and their relationship was sealed by an agreement dated 4 September 1992. Towards this end, the appellant maintained an account *vide* No. 010612-200 ("account") and on 28 February 1994 the account showed a deficit of US$18,329.54. By cl. 4(b) of the agreement, the debit balance shall be charged with interest thereon at 2% per calender month and the appellant shall, upon demand, settle all liabilities outstanding to the respondent together with all costs of collection and the necessary legal fees. Since the appellant defaulted in injecting US$18,329.54 into his account, the respondent through their solicitors sent two notices dated 10 March 1994 and 6 July 1994 and demanded payment of that sum. As expected, the appellant refused and/or neglected to pay that sum as demanded. The respondent had no choice but to file a claim in the Sessions Court, Johor Bahru and sought for the following reliefs:

(a) the return of US$18,329.54 (or its equivalent in Malaysian currency);

(b) interest on that sum at 2% per calender month from 1 March 1994 until payment or realization;

(c) Costs; and

(d) any further or other relief.

The appellant in his statement of defence denied all the allegations levelled against him and put the respondent to strict proof thereof. Finally, the appellant prayed that the respondent's claim be dismissed with costs.

The respondent then filed a notice in Form 65 supported by an affidavit in Form 75A to show that there was no defence to their claim and sought for summary judgment thereof under O. 26A of the Subordinate Courts Rules 1980 ("SCR"). Simon Chan Pui Kwong ("Simon") in his capacity as the managing director of the respondent's company affirmed an affidavit dated 13 December

1994 and deposed that he had personal knowledge of what he affirmed. Simon deposed that the appellant was justly and truly indebted to the respondent in the sum of US$18,329.54 with interest thereon at 2% per month from 1 March 1994 until realization or full payment. To show that debt existed, Simon annexed to his affidavit pertinent documents like the agreement dated 4 September 1992, the monthly statements from September 1992 to February 1994, the letter of demand dated 10 March 1994 together with the letter of posting and, lastly, another letter of demand dated 6 July 1994 together with its certificate of posting. Simon also deposed that the statement of defence did not disclose any defence on the merits. In response, the appellant affirmed an affidavit on 14 March 1995 and in it he, *inter alia*, denied the allegations of Simon and prayed that the application under O. 26A of the SCR be dismissed with costs.

The learned Judge of the Sessions Court, Johor Bahru ruled in favour of the respondent and granted the summary judgment sought for under O. 26A of the SCR. The appellant being dissatisfied filed an appeal and, through Encik Mohamed Hanipa bin Maidin, it was argued that by virtue of cl. 13 of the agreement the matter should be resolved by and in compliance with the laws of Hong Kong and the parties should submit to the Court in Hong Kong. Encik J.W. Tan for the respondent argued that cl. 13 of the agreement, worded in its present form, cannot oust nor prevent the respondent from filing his claim in the Malaysian Court against the appellant. It is appropriate, at this juncture, to set out verbatim cl. 13 of the agreement. It is as follows:

> 13. This agreement and its enforcement shall be governed by the laws of Hong Kong and its provisions shall be continuous; shall cover individually and collectively all accounts which the customer may open or re-open with Peregrine, and shall inure to the benefit of and bind Peregrine. Peregrine's successors and assigns, whether by merger, consolidation or otherwise, as well as the heirs, executors, administrators, legatees, successors, personal representatives and assigns of the customer and the customer hereby submits to the jurisdiction of the Court of Hong Kong.

On the authorities of *ELF Petroleum SE Asia Pte. Ltd. v. Winelf Petroleum Sdn. Bhd.* [1986] 1 MLJ 177 and *The Fehmarn* [1957] 2 ALL ER 707; [1957] 1 WLR 815; [1957] 1 *Lloyd's* Rep. 511. I would agree with Encik J.W. Tan that even though the parties had by cl. 13 of the agreement agreed that the enforcement of the agreement should be by way of the Hong Kong law and through the Hong Kong Court, that by itself did not oust the jurisdiction of the Malaysian Court to try an action arising out of the agreement. That the Malaysian Court has jurisdiction to hear the dispute is clearly provided for in s. 23(1) of the Courts of Judicature Act 1964 which enacts as follows:

> Subject to the limitations contained in Art. 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:

(a) the cause of action arose, or

(b) the defendant or one of several defendants resides or has his place of business, or

(c) the facts on which the proceedings are based exist or are alleged to have occurred, or

(d) any land the ownership of which is disputed is situated,

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

Now, for the Malaysian Court to assume jurisdiction, on the authority of *Lam Kok Trading Co. (Pte.) Ltd. & Anor. v. Yorkshire Switchgear and Engineering Co. Ltd.* [1976] 1 MLJ 239**,** either one of paras. (a) to (d) of s. 23 (1) of the Courts of Judicature Act 1964 must be fulfilled. In the same vein, the then Supreme Court in *Malayan Banking Bhd. v. International Tin Council and Anor. Appeal* [1989] 3 MLJ 286 held, *inter alia*, that under s. 23(1) (b) of the Courts of Judicature Act 1964 the extra-territorial jurisdiction of the Malaysian High Court would crystallize where the defendant resides or has his place of business within Malaysia. From the appeal record, the appellant's residential as well as business address were said to be in Taman Pelangi, Johor Bahru. This would certainly qualify him as a litigant in a Malaysian Court.

It is germane to mention here that the appellant had entered an unconditional appearance and filed his statement of defence. These can be construed adversely against the appellant in that there was a waiver on his part to any objections which he might have had on the question of jurisdiction. Bluntly put, the appellant had by his conduct submitted to the jurisdiction of the Malaysian Court. On the question of arbitration, it was not adverted to in the statement of defence nor in the appellant's affidavit-in-reply to the application for summary judgment by the respondent and it is quite obvious that it is raised before me as an after thought, couched so to speak, as a point of law. But alas, having submitted to the jurisdiction of the Malaysian Court as alluded to earlier, the question of arbitration was waived by the appellant. "Waiver is not a cause of action, but a man may be debarred by the doctrine of waiver from asserting that an original condition precedent is still operative and binding" (*Hartley v. Hymans* [1920] 3 KB 475, per Mc Cardie J at p. 495). "Whether it is called waiver or forbearance on his part, or an agreed variation or substituted performance does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made in effect a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it" (*Charles Rickards Ltd. v. Oppenhaim* [1950] 1 KB 616, per Denning LJ at p. 623).

Next, Encik Mohamed Hanipa mounted an argument that the appellant was not provided with an account and, consequently, the respondent must be put to strict proof thereof. The answer to this argument is found, by way of an analogy, in the case of *Bank Bumiputra Malaysia Berhad v. Doric Development Sdn. Bhd. & 2 Ors.* [1988] 1 CLJ 311 where the headnote reads as follows:

> It would not be sufficient for the Guarantor to merely say that the account was not supplied and that the Bank would therefore be put to strict proof, for such account could always have been obtained on request to the Bank or from the Company, and putting merely the Bank to strict proof would not amount to a condescension on particulars by the Guarantor when showing cause to an O. 14 RHC application, as after all by averring that the plaintiff be put to strict proof would only amount to a mere denial.

Here, from the facts as set out in the early part of this judgment, the appellant was supplied with the monthly statements ranging from September 1992 to February 1994. These statements as reflected in the record of appeal are quite in detail and would surely answer the allegation by the appellant that he was not supplied with the statement of account. If it was argued, as it was attempted to be argued, that the question of a proper statement of account would necessarily be a triable issue and, consequently, an O. 26A of the SCR as granted by the learned Judge of the Sessions Court should be set aside, one must then proceed to look at the facts of each case as disclosed in the affidavit evidence to see and detect whether there is in fact a triable issue. On this point, by way of an analogy the case of *Bank of Negara Malaysia v. Mohd Ismail & Ors.* [1992] 1 MLJ 400 SC immediately comes to mind and the headnote reads:

> (1) In an application under O. 14, the Court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the said issue is triable. The determination of whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the Court. A complete defence need not be shown. The defence set up need only show that there is a triable issue.
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> (2) Under an O. 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. Unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially in an O. 14 application.
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> (3) Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the Court should exercise its duty under O. 14. If the legal point is understood and the Court

> is satisfied it is unarguable, the Court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'.

The affidavit evidence of the present case as far as the respondent is concerned was entirely within the rule as set out in *Murphy v. Nolan* 18 LR (Ireland) 468 where Lord Ashbourne lucidly enunciated it in the following terms (see p. 470):

> Now, there is no question but that the affidavit in support of a motion for judgment must do two things:
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> (1) verify the cause of action; and
>
> (2) state that the defendant has no defence. The contention here is that the cause of action was not sufficiently verified. The way the cause of action was verified was this:
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> The defendant herein is indebted to me in the sum of RM24.16 as per particulars specially indorsed on the writ of summons herein.

Simon in his affidavit in support of the application under O. 26A of the SCR deposed aptly in these words:

> The defendant Ng Lai Tien, is and was at the commencement of this action, justly and truly indebted to the abovenamed plaintiff in the sum of US$18,329.54 together with interest thereon at 2% per month from 1 March 1994 until realization or full payment. The particulars of the said claim appear by the statement of claim in this action.

I venture to say that verification of the facts in the context of O. 26A of the SCR must mean that the respondent has to swear to the truth of the facts on which the claim is based. This has been fulfilled by the respondent.

Now, in so far as the appellant's affidavit in rebuttal of that of Simon is concerned, it amounts to nothing more than a mere denial. But somehow Encik Mohamed Hanipa manipulated this method of rebuttal and argued that such denial did not receive any reply from the respondent and, consequently, it was capitalized by him to argue that the respondent admits to what was alleged by the appellant. The cases of *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 2 AMR 1174; [1995] 2 MLJ 287 and *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 MLJ 281 CA were relied heavily by Encik Mohamed Hanipa. With respect, the manner in which these cases were utilized to capitalize on what can be said to be mere denials and not positive averments in the affidavit of the appellant was certainly an attempt to bolster the appellant's case without just cause. The crucial question to pose is this: Must the respondent file an affidavit in reply to that of the appellant in the face of a mere denial? The answer would certainly be a resounding: No. What is there to reply to, in the first place, when there is a mere denial to an

averment? It is only a positive assertion in an affidavit upon a material issue that needs a reply. It is patently clear that the appellant's affidavit couched in negative terms do not merit a reply from the respondent. Incidentally, the *English Supreme Court Practice 1979*, Vol. 1, part 1 commonly referred to as the White Book at p. 139 contains a passage on summary judgment procedure under the English O. 14 which bears reproduction. It is as follows:

> The defendant's affidavit (this is in relation to the appellant's affidavit in the present appeal) must 'condescend upon particulars' and should, as far as possible, deal specifically with the plaintiff's claim and affidavit (this is in relation to the respondent's claim and affidavit in the present appeal), and state clearly and concisely what the defence is, and what facts are relied on as supporting it. It should also state whether the defence goes to the whole or part of the claim, and in the latter case it should specify the part.
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> A mere general denial that the defendant (it is the appellant in the present appeal) is indebted will not suffice (*Wallingford v. Mutual Society* [1880] 5 App. Cas., per Lord Blackburn, at p. 704; *Re General Rail, Syndicate, Whiteley's Case* [1900] 1 Ch., per Lindley MR, at p. 369; *Anon*, [1875] WN 249, per Quain J, at p. 250), unless the grounds on which the defendant (it is the appellant in the present appeal) relies as showing that he is not indebted are stated (*ibid*). If the affidavit commences, as it may, with a statement that the defendant (it is the appellant in the present appeal) is not indebted to the plaintiff (it is the respondent in the present appeal) in the amount claimed, or any part thereof, it should proceed to state why the defendant (it is the appellant in the present appeal) is not so indebted, and to state the real nature of the defence relied on (*Re General Rail, Syndicate, supra*).

Finally, it was argued on behalf of the appellant that by virtue of s. 8 of the Exchange Control Act 1953 the respondent would be barred from taking US$18,329.54 outside Malaysia unless the permission of the Controller of Foreign Exchange was obtained for that purpose. Before me both parties agreed that the permission of the Controller of Foreign Exchange had yet to be obtained. The same point was ventilated before *Syed Ahmad Idid JC* (now Judge) in *Diversey (Far East) Pte. Ltd. v. Serba Pakar Kimia Sdn. Bhd.* reported in 1991 *Mallal's Digest* at p. 85 para. 281. The defendant there contended that the plaintiff had not complied with the Exchange Control Act 1953 because no written permission from the Controller of Foreign Exchange had been obtained. His Lordship Syed Ahmad Idid JC (now Judge) held, *inter alia*, that since s. 8 of the Exchange Control Act 1953 prohibits payment to person resident outside Malaysia, the defendant was thus caught within that prohibition. His Lordship proceeded further to hold that: "However, even if permission from the Controller had not been obtained, under cl. 1 of Schedule 4 of the Exchange Control Act 1953, the writ could direct the sheriff who carried out the seizure to pay the proceeds of the execution into Court. Before the money could be released to the plaintiff, the requisite permission should be obtained under O. 22 r. 19 of the Rules of the High Court 1980. The

plaintiff's execution of the writ was therefore not illegal." Applying *Diversey (Far East) Pte. Ltd. v. Serba Pakar Kimia Sdn. Bhd. (supra)* to the facts of the present appeal, it can be said that s. 8 of the Exchange Control Act 1953 would prohibit the respondent from obtaining the judgment sum of US$18,329.54 unless the judgment sum is paid into Court. Now, once that judgment sum is paid into Court the respondent should proceed by way of O. 22 r. 9(1) of the Rules of the High Court 1980 to apply for payment out of Court that money to them. But what is germane to remember is this. The respondent is not barred under the Exchange Control Act 1953 to file their claim in the Sessions Court, Johor Bahru even without the permission of the Controller of Foreign Exchange. That this is so is clearly spelt out in para. 4(1) of the Fourth Schedule to the Exchange Control Act 1953 which reads as follows:

> In any proceedings in a prescribed Court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Controller and of that permission not having been given or having been revoked.

For the reasons adumbrated above, I dismissed the appeal with costs.

Reported by Akbardin Hj. Abd. Kadir